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IN THE

Supreme Court of the United States

October Term 1963

No. 528

NORFOLK DREDGING COMPANY,
a Virginia corporation,

Petitioner,

vs

SYLVESTER LAWRENCE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

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IN THE

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No.

NORFOLK DREDGING COMPANY,
a Virginia corporation,

Petitioner,

vs.

SYLVESTER LAWRENCE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

Norfolk Dredging Company, your Petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered in the above-entitled case on July 16, 1963.

OPINIONS BELOW

The memorandum opinion of the District Court denying Defendant's motion to dismiss is reported at 194 F. Supp. 484 (Appendix A). The opinion of the Court of Appeals is reported at 319 F. 2d 805. (Appendix B)

JURISDICTION

The judgment of the Court of Appeals was entered on July 16, 1963. The jurisdiction of the Court is invoked under the provisions of 28 U.S.C.A. 1254(1).

QUESTION PRESENTED

Whether in a suit brought under the Jones Act, 46 U.S.C.A. 688, for personal injuries sustained on navigable waters of the United States, the Petitioner was entitled to have the jury rather than the court determine Respondent's status as "a member of the crew of a vessel" as the term is used in the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A. 901, et seq.

STATUTES INVOLVED

The statutes involved are 46 U.S.C.A. 688, commonly known as the Jones Act, and 33 U.S.C.A. 901, et. seq., commonly known as the Longshoremen's and Harbor Workers' Compensation Act.

STATEMENT

Respondent, who is thirty-five years of age, was employed by Petitioner for a period of approximately ten years. On September 3, 1957, while supervising the movement of an anchor from an equipment barge to Derrick Barge #8, in the waters of Oregon Inlet near Manteo, North Carolina, Respondent suffered an injury to his right leg. He was hospitalized until May 5, 1958. On April 5, 1959 he returned to work for Petitioner in the same capacity he enjoyed before the injury.

Petitioner is a dredging company and customarily

moves earth from shoal waters to the shore. Its apparatus includes digging equipment and hydraulic lines through which the silt moves to the disposal area. While the dredge is in operation it is virtually stationary although it inches along the ground as its work progresses. The structure is made rigid by the use of spuds embedded in the soil or bottom. It has no motive power. The dredge serves as a base of operation for a gang of laborers who handle the pipelines which convey the silt. Respondent was one of these laborers. (R. Appellant's Appx. p. 38). He had no seaman's papers, no nautical training and no watch-standing duties as is customary aboard a seagoing vessel. (R. Appellant's Appx. pp. 36, 48, 39). He was paid by the hour and was free to leave the dredge when his work was completed. (R. Appellant's Appx. pp. 44, 39). On the frequent occasions when he slept and ate aboard the dredge he paid for his board and room. (R. Appellant's Appx. p. 38). In the course of his employment he worked in building up land areas for highways, levees and spillways. (R. Appellant's Appx. pp. 50, 51).

In January, 1960, Respondent filed a Complaint under the Jones Act (46 U.S.C.A. 688) alleging that he was injured while employed as a member of a crew of a vessel owned by Petitioner and demanding a jury trial. Petitioner filed a motion to dismiss on the grounds that Respondent's exclusive remedy was under the Longshoremen's and Harbor Workers' Compensation Act (33 U.S. C.A. 901, et. seq.). In a memorandum opinion reported at 194 F. Supp. 484, the trial court denied Petitioner's motion on the ground that the status of Respondent could not be determined as a matter of law. Petitioner then filed its answer denying that Respondent was a member of a crew of a vessel and a counterclaim seeking recovery or set-off of the sums paid to Respondent pursuant to the

Longshoremen's and Harbor Workers' Compensation Act.

On March 26, 1962, the case was tried before a jury. Petitioner, however, was denied a jury trial on its counterclaim. Neither was the jury allowed to consider the issue of Respondent's status as a "seaman-member of a crew", the Court instructing the jury that Respondent occupied such a status as a matter of law. The jury returned a verdict for the Respondent in the amount of $100,000.00. The District Court declined to set aside the jury's verdict, entering judgment for the Respondent on December 20, 1962. The judgment of the District Court was affirmed by the Circuit Court of Appeals for the Fourth Circuit on July 16, 1963.

REASONS FOR GRANTING THE WRIT

The Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A. 901, et. seq., provides compensation for injuries "occurring upon the navigable waters of the United States" and is by its terms an exclusive remedy. The Act, however, expressly excludes from its coverage "a master or member of a crew of any vessel," 33 U.S.C.A. 903(a)(1). Thus, in an action under the Jones Act, 46 U.S.C.A. 688, seeking damages for injuries sustained on navigable waters of the United States it is essential to the claimant's right to recover that he be "a master or member of a crew of a vessel." The decision as to a claimant's status as such has heretofore been deemed a decision of fact rather than of law and has been left to the discretion of the jury. In the instant case, however, the trial court instructed the jury that Respondent was, as a matter of law, a "member of a crew of a vessel." The Circuit Court affirmed.

In order to appreciate the nature of Respondent's employment it is necessary to understand the design and function of a hydraulic dredge and its attendant equipment.

A hydraulic dredge is essentially a barge laden with equipment. Although generally defined as a vessel, it differs from most vessels in that it is peculiarly adapted to the single function of removing earth by pipeline from one location to another. It does not transport goods and materials as do most vessels and does not provide its own motive power. Those who labor about a dredge may be divided into two categories: first, a group which works primarily aboard the dredge itself, such as the captain and engine room personnel, and secondly, a group which concerns itself primarily with the movement and maintenance of the long pipelines which convey the dredged material to a disposal area. The Respondent was one of the latter and his duties consisted almost entirely of tending pipeline both in shoal water and on land. Because of the peculiar nature of Respondent's duties, as well as other factors which will be enumerated later, Petitioner contends that Respondent's status is distinctly different from the usual concept of a "member of a crew of a vessel"; that the record contains evidence upon which the jury could have determined that Respondent was not a "member of a crew"; and that the trial court in ruling on the issue as a matter of law, and the Circuit Court in affirming, violated the mandate of this Court in *South Chicago Coal & Dock Co., et al, vs Bassett, Deputy Commissioner,* 309 U.S. 251, 258 S. Ct. 544, 84 L. Ed. 448, and in the decisions following its precedent. (See *Senko vs LaCrosse Dredging Corp.*, 352 U. S. 370, 77 S. Ct. 415, 1 L. Ed. 2d 404; *Grimes vs Raymond Concrete Pile Co.*, 356 U. S. 252, 78 S. Ct. 687, 2 L. Ed. 737).

The gist of the Bassett decision, supra, is contained in the following excerpt from the opinion delivered by Mr. Chief Justice Hughes:

> "So far as the decision that this employee, who was at work on this vessel in navigable waters when he sustained his injuries, was or was not a 'member of a crew' turns on questions of fact, the authority to determine such questions has been confided by Congress to the deputy commissioner. Hence the Court of Appeals correctly ruled that his finding, if there was evidence to support it, was conclusive and that it was the duty of the District Court to ascertain whether it was so supported and, if so, to give it effect without attempting a retrial." (Page 257).
>
> * * * *
>
> "Petitioners urge that the question whether the decedent was a member of a 'crew' was a question of law. That is, that *upon the undisputed facts* the decedent must be held as a matter of law to have been a member of a 'crew' as distinguished from a longshoreman or laborer at work upon the vessel. We are unable to so conclude." (Page 258) (Emphasis added).
>
> * * * *
>
> "Even if it could be said that the evidence permitted conflicting inferences, we think that there was enough to sustain the deputy commissioner's ruling." (Pages 260-261).
>
> "The judgment of the Court of Appeals is affirmed." (Page 261).

Further clarification of the court's position was provided by the *Senko* decision, supra, in which Mr. Justice Reed in delivering the opinion stated as follows:

> "In *South Chicago Co. vs Bassett*, 309 U. S. 251, we

said that whether or not an employee is 'a member of a crew turns on questions of fact' and that, if a finding on this question has evidence to support it, the finding is conclusive. * * * *" (Pages 371-372).

* * * * *

"* * * We believe, however, that our decision in *South Chicago Co. vs Bassett,* supra, has not been fully understood. Our holding there that the determination of whether an injured person was a 'member of a crew' is to be left to the finder of fact meant that juries have the same discretion they have in finding negligence or any other fact. The essence of this discretion is that a jury's decision is final if it has a reasonable basis, * * * *" (Page 372).

* * * * *

These two decisions (Bassett and Senko) define, in terms as clear as such definitions permit, the function of the jury in determining the status of a Jones Act claimant. Nevertheless, it has been necessary for this Court on numerous occasions to reassert the basic doctrine that whether or not a claimant is a "member of a crew" is an issue to be determined by the trier of the facts. (*Gianfala vs Texas Co.,* 350 U. S. 879, 76 S. Ct. 141, 100 L. Ed. 775; *Butler vs Whiteman,* 356 U. S. 271, 78 S. Ct. 734, 2 L. Ed 2d 754; *Braen vs Pfeifer Oil Trans. Co.,* 361 U. S. 129, 80 S. Ct. 247, 4 L. Ed. 2d 191; *Grimes vs Raymond Concrete Pile Co.,* supra.) The dilemma presented by the issue has even extended into the state courts. *Brannan vs Great Lakes D. & D. Co.,* 253 Minn. 28, 91 N. W. (2d) 166, 1963 A. M. C. 1053.

The seeming reluctance of the lower courts to adhere to this basic doctrine results in the writer's opinion, from a two-fold cause: first, the courts have tended to overdefine, in legal terms, the simple phrase "member

of a crew of a vessel;" secondly, the Circuit Courts (certainly the Fourth Circuit in this instance) have placed a distorted interpretation upon this Court's decision in *Norton vs Warner Co.*, 321 U. S. 565, 88 L. Ed. 931, where it was held that on the peculiar facts of the case reasonable men could not differ as to the claimant's status as a "member of a crew." As a consequence there has been a gradual errosion, almost imperceptible in the individual decision, of the area in which Congress intended the jury to function. The decisions of the Circuit Courts have built one upon the other in the manner of an inverted pyramid until, as here, the basic law connot support the ensuing results.

The error is manifest in the following excerpt from the opinion of the Circuit Court in the instant case:

> "We feel that our disposition of the question in the instant case is controlled by the Supreme Court decision in *Norton vs Warner Co.*, 321 U. S. 565 (1944), wherein the Court held that as a matter of law the injured employee was a member of the crew. The only apparent difference between *Norton* and this case before us is that in the former the injured employee received his compensation on a monthly rather than on an hourly basis and performed somewhat less varied duties. There, as here, the vessel was a barge, had no motive power, the employee bought his own meals, had little experience as a seaman and had only incidental navigational duties such as handling lines, responding to the whistles of tugs and posting navigational lights and signals, while his main duties consisted of taking general care of the vessel.
>
> * * * *
>
> "The dredging company attempts to distinguish the *Norton* case from the instant case, on the theory that the claimant in Norton was aboard exclusively for navigational purposes; but we are told by the court

in that decision that navigational, in the broad sense in which it is used in these cases, is not confined strictly to the actual navigating or movement of the vessel but 'embraces duties essential for other purposes of the vessel,' and that a person who at all times contributes to the labors about the operation and welfare of the vessel when she is upon a voyage is engaged in 'navigation' and must be considered a member of the crew." (Appendix B, pp. 6, 7).

The Circuit Court has sifted the facts to fit the legal mold. The vessel here was not a barge but a dredge (admittedly a slight distinction). More significantly, the Respondent's duties did *not* include "taking general care of the vessel." His duties were not only "more varied" but were to an extreme degree more dissociated from the welfare of the vessel. The Respondent was not required to be continuously aboard as was the claimant in the Norton case, who was in fact the only person assigned to the barge and alone responsible for its seaworthiness.

In ignoring these manifold distinctions the Circuit Court has further constricted the area in which the jury may exercise its discretion. It has seized upon those facts which in the Norton case were deemed significant in finding the claimant to be a "member of a crew" but has ignored those facts of a more pragmatic but less legalistic significance. That the Respondent was not required by the terms of his employment to stand by the vessel until the completion of its so-called voyage, that he was not exposed to the perils of the open sea, that he was not required to remain aboard to stand watches and thereby incur additional hazards and discomforts; these factors which distinguish the Respondent from the traditional concept of a seaman have been ignored while resort has been had to fictional definitions of the term "navigational

duties." Thus, by this gradual process of redefinition the issue has been transformed into a matter of law, not because Congress intended it thus, but because the Courts in an eagerness to find and furnish guidelines have replaced the words "member of a crew" with more complex phraseology requiring legal rather than practical analysis.

What, then, is the area in which Congress intended for the fact-finder to exercise its discretion?

There are on the one hand those seamen who are unquestionably members of the crew of a vessel. They are signed on in various capacities for the duration of the voyage and their duties are unquestionably connected with the navigational function of the vessel; they in some manner facilitate its movement (whether cooks or engineers) from one point to another. There are on the other hand those persons whose work, though connected with vessels and shipping, is primarily dockside and who contribute to the welfare of the vessel only in the sense that they are necessary to the fulfillment of the vessel's purpose; these are such workers as stevedores, or refitters. The former group was undoubtedly intended by Congress to be excluded from the Longshoremen's Act, whereas the latter were unquestionably intended to be included. Between these two clearly defined groups, however, is a third group composed of maritime workers whose duties are such that they cannot be defined either as members of a crew or as longshoremen. This group is to a large extent composed of dredgemen and bargemen who labor in inland waters and whose duties cannot be clearly defined as navigational. It is within this third group that the fact-finding body must exercise its discretion.

The nature of the jury's discretion and the broad

lines in which it may be exercised are well described in *Offshore Company vs Robison*, 266 F. 2d 769 (5 Cir., 1959), at pages 779, 780:

> "Attempts to fix unvarying meanings have a firm legal significance to such terms as 'seamen,' 'vessel,' 'members of a crew' must come to grief on the facts. These terms have such a wide range of meaning, under the Jones Act as interpreted in the courts that, except in rare cases, only a jury or trier of facts can determine their application in the circumstances of a particular case. Even where the facts are largely undisputed, the question at issue is not solely a question of law when, because of conflicting inferences that may lead to different conclusions among reasonable men, a trial judge cannot state an unvarying rule of law that fits the facts. The Jones Act cases involving coverage are similar in this respect to many negligence and contributory negligence cases.
>
> "Under the Jones Act, judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that the claimant was a seaman, a member of a crew of a vessel. * * *"

The evolution, via judicial decision, of the concept of what constitutes a "member of a crew" and the extent of the resulting conflict in the cases are evidenced from a comparison of the instant case with the much earlier decision in *Diomede et al vs Lowe, Deputy Com'r, et al*, 87 F 2d 296 (2nd Cir., 1937), cert. den., 301 U. S. 682, 81 L. Ed. 1340, 57 S. Ct. 783.

Here, the facts relevant to Respondent's status as a member of a crew are as follows:

1. He was paid by the hour. (R., Appellant's Appx., p. 44).

2. After working hours he could go and come as he pleased. (R., Appellant's Appx., p. 39).

3. He did not go to seamen's school. (R., Appellant's Appx., p. 48).

4. He did not have seamen's papers. (R., Appellant's Appx., pp 36, 49).

5. His primary duty was to handle pipeline and to see that it was in proper condition. (R., Appellant's Appx., p. 49).

6. After his accident he returned to his same job, (R., Appellant's Appx., pp. 50, 56), which he later described as building up land areas for highways and construction on land, maintaining levees, spillways and pontoon lines. (R. Appellant's Appx., p. 51).

7. He frequently ate and slept aboard the dredge but on such occasions paid room and board. (R., Appellant's Appx., pp. 38, 43).

8. His work was essentially that of a laborer and foreman over laborers. (R., Appellant's Appx., pp 38, 49).

9. The primary duty of the laborers was the handling of pipeline which included pipeline on the shore as well as the pontoon lines. (R., Appellant's Appx. p. 38).

10. He sometimes handled lines in tying up barges or tender boats and put out kerosene lights on floating auxiliary structures. (R., Appellant's Appx. pp. 31, 32).

Despite the existence of these undisputed facts, the issue was taken from the jury and respondent was found to be a member of a crew as a matter of law.

In *Diomede vs Lowe*, supra, the decedent, Nicholas

Diomede had been in charge of a dump scow. He was required to remain aboard at all times except when special permission was granted and was paid $1.00 per day with extra compensation of $3.00 per day when the scow was loading or on a voyage. His duties as determined by the Deputy Commissioner were as follows:

> "* * * to supervise the loading of the scow so that the cargo would be evenly distributed and the scow ride on even keel; to be watchful lest the scow become unseaworthy; to make minor repairs to prevent the same; to pump out water which leaked into the barge; to unfasten the lines from the dock to the scow when voyages were begun; to lengthen and shorten the lines between the tow and the scow when necessary enroute; to tie up the scow to the dock upon return from a voyage; to open and close the hatches of the scow; to dump the cargo upon arrival at the dumping grounds; to splice the lines when necessary, and to keep running lights in order and visible." (Page 297).

In a proceeding by Angelia Diomede, the decedent's widow, to recover compensation under the Longshoremen's Act, supra, the Deputy Commissioner rejected the claim on the grounds that decedent was a "member of a crew." In a suit to set aside the Deputy Commissioner's order the District Court found for the plaintiff, holding that the decedent was not a member of a crew. The United States Court of Appeals for the Second Circuit affirmed. This Court denied certiorari.

It is apparent that in his permanency of attachment to a vessel and in his performance of duties of a traditionally navigational nature, Diomede was more distinctly a member of a crew than was Respondent.

The conflict between this case and the Diomede case

is only one of many which have resulted from the incursion of the judiciary upon the domain rightfully that of the jury. In order to resolve these conflicts by clear reassertion of the jury's function in these cases, Petitioner urges that this Court grant certiorari. The issue involves more than a mere weighing of the evidence; it involves a basic interpretation of the jury's function in a critical area of maritime law.

The first thing demanded by Respondent's complaint was trial by jury. Petitioner too wished a trial by jury and designed its case upon the presumption that its right to such a trial would not be denied. The value of this right is inestimable: it is basic, deeply rooted in our legal tradition. As Mr. Justice Sutherland wrote, speaking for the court in *Dimick vs Schiedt*, 293 U. S. 474, 485:

> "The right of trial by jury is of ancient origin, characterized by Blackstone as 'the flory of the English law' and 'the most transcendent privilege which any subject can enjoy' (Bk. 3, p. 379); and, as Justice Story said (2 Story on the Constitution, sec. 1779), ' * * * the Constitution would have been justly obnoxious to the most conclusive objection if it had not recognized and confirmed it in the most solemn terms.' With, perhaps, some exceptions, trial by jury has always been, and still is, generally regarded as the normal and preferable mode of disposing of issues of fact in civil cases at law as well as in criminal cases. Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care."

The right to a jury trial has frequently been reasserted with specific reference to cases under the Jones Act. in

24 NACCA Law Journal at page 208, *Offshore Co. vs Robison*, supra, is commented upon as follows:

> "Two of Judge Wisdom's cardinal conclusions in the instant case are surely unassailable: Congress has seen fit to allow juries to decide who are 'seamen' under the Jones Act, and the Supreme Court has underwritten and revitalized the role of the jury's prerogative in crew-member-determination cases. This in turn has resulted in the salutory extension of the benevolent provisions of the Jones Act to non-traditional or borderline seamen and unconventional vessels."

And further at page 209:

> "If there ever was any doubt as to the primacy of the jury's role in resolving the issue of seaman-status in Jones Act suits, that doubt has been laid to rest, for those who read understandingly, by the Supreme Court's repeated rulings in the Grimes-Butler series of cases." Referring to *Butler vs Whiteman*, 356 U. S. 271, and *Grimes vs Raymond Concrete Pile Co.*, 245 F. 2d 437, (1 Cir., 1957) reversed 356 U. S. 252 (1958).

Again the right to trial by jury in a Jones Act case was the issue in *Jacob vs New York City*, 315 U. S. 752, 62 S. Ct. 854, 86 L. Ed., 1166, where Mr. Justice Murphy in delivering the opinion stated:

> "The right of jury trial in civil cases at common law is a basic fundamental feature of our system of federal jurisprudence which is protected by the Seventh Amendment. A right so fundamental and sacred to the citizen, whether guaranteed by the Constitution or provided by statute, should be jealously guarded

by the courts. The present case is a suit by petitioner under the Jones Act for personal injuries sustained when he fell because the wrech he was using to tighten a nut slipped under the torque applied to it. We are called upon to determine whether on the evidence adduced by petitioner, and in contravention of accepted juridical standards, petitioner was wrongfully deprived of his statutory right to jury trial by the action of the trial court in dismissing his complaint, thereby refusing to submit the case to a jury which had been duly empanelled to try it." (Pages 752, 753).

* * *

" * * * Without doubt the case is close and a jury might find either way. But that is no reason for a court to usurp the function of the jury. We are satisfied that a due respect for the statutory guaranty of the right of jury trial, with its resulting benefits, requires the submission of the case to the jury." (Page 756).

Petitioner has cited the foregoing authorities in detail (hoping not to belabor a point with which the Court is undoubtedly in agreement) because it feels that therein rests the urgency of this Petition. The denial of trial by jury is a theme which has been played upon time and again and doubtless the Court tires of its repetition. But the danger that this right may be denied lies not in the obvious and gross violations but in those which come about, as here, by a gradual and seemingly legitimate wresting by the judiciary. Petitioner urges that its right to a jury trial as well as that of the Respondent and the many others similarly situated be protected by a full restoration of the jury to its rightful function in a suit under the Jones Act.

CONCLUSION

The ruling below conflicts with the decisions of this Court and deprives the Petitioner of a trial by jury. Accordingly, the writ should be granted.

Respectfully submitted,

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APPENDIX A

IN THE

United States District Court

FOR THE EASTERN DISTRICT OF VIRGINIA

NORFOLK DIVISION

SYLVESTER LAWRENCE,

Plaintiff,

v.

Civil Action No. 3436

NORFOLK DREDGING CO., INC.,

Defendant.

MEMORANDUM

Plaintiff, employed as a deckhand on defendant's dredge TALCOTT, was injured on September 3, 1957, while the dredge was in navigable waters at Oregon Inlet, near Manteo, North Carolina, when an anchor was allegedly dropped on his leg. Without the benefit of an award, plaintiff was paid the sum of $4,466.55 over a period of nineteen months and defendant further expended $6,196.64 by way of medical expense, all pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901, *et seq.*

On March 17, 1960, this action was instituted under the Jones Act, 46 U.S.C. § 688, in the United States Dis-

trict Court for the District of Columbia which, after certain preliminary proceedings, transferred the case to this Court. Defendant has now filed a motion to dismiss alleging that plaintiff elected to claim and receive the benefits of the Longshoremen's and Harbor Workers' Compensation Act and hence cannot now seek another remedy. There is no contention that plaintiff was not aware of his right, and we are met with the single issue as to whether a "seaman," having elected to receive and accept the benefits of the Longshoremen's and Harbor Workers' Compensation Act, is thereby precluded from maintaining his action under the Jones Act. Stated otherwise, where the status of one aboard a vessel in navigable waters may be in serious dispute, does the election of one remedy foreclose recourse in another channel?

For the sole purpose of defendant's motion to dismiss, it is conceded that plaintiff occupies the technical status of "seaman." Arguing that cases arising under the "twilight zone" doctrine should preclude a possible remedy under the Jones Act, defendant seeks to invoke the principles established in *Davis v. Department of Labor*, 317 U. S. 249, and *Hahn v. Ross Island Sand & Gravel Co.*, 358 U. S. 272. The difficulty with this contention is revealed in *Norton v. Warner Co.*, 321 U. S. 565, 569, footnote 3, where the Supreme Court limited the effect of the *Davis* case to problems involving state compensation acts and the Longshoremen's and Harbor Workers' Act. As suggested in *Norton*, we have, in the present case, two mutually exclusive federal systems where the risk of choosing the wrong remedy has been anticipated by Congress and at least partially avoided. As Justice Douglas points out, to permit an award to stand "there would be brought within the Act a group of workers whom we do not believe Congress intended to included," and "where

Congress has provided that those basic rights (Jones Act, unseaworthiness, maintenance and cure) shall not be withheld from a class or classes of maritime employees it is our duty on judicial review to respect the command and not permit the exemption to be narrowed whether by administrative construction or otherwise."

In *Grimes v. Raymond Concrete Pile Co.*, 356 U. S. 252, an action was instituted under the Jones Act for injuries suffered while being transferred at sea in a "Navy life ring" from a tug to a Texas Tower in process of construction. The employer urged that plaintiff's exclusive remedy was under the Defense Bases Act, 42 U.S.C. § 1651-1654, which incorporates the remedies of the Longshoremen's and Harbor Workers' Act. The Supreme Court, noting that the Defense Bases Act does not apply in respect to the injury or death of "a master of member of a crew of any vessel," held that a jury question was presented as to the status of the injured employee. The dissenting opinion agreed that the Defense Bases Act does not foreclose "seamen" from having recourse to the Jones Act and, in *Grimes*, the record disclosed that the injured employee had collected compensation under the Defense Bases Act. As the provisions of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 902, specifically defines an "employee" as not including "a master or member of a crew of any vessel," it is, in the opinion of this Court, impossible to reconcile the *Norton* and *Grimes* cases with the position now advanced by the defendant.

The authorities relied upon by the defendant deal, in the main, with conflicts arising under the "twilight zone" doctrine by reason of state and federal conflicts. Only in *Outts v. A. P. Ward & Son, Inc.*, N. D. Fla., 146 F. Supp.

733, and *Flores v. Frann,* D. C. P. R., 175 F. Supp. 140, have questions of election by seamen been presented. In *Ousts,* the Court merely held that, in any event, plaintiff would receive more under the compensation act then he would be entitled to under the general maritime law, and that no proof of negligence had been shown. The *Flores* case concluded that the Jones Act did not apply to the local waters of Puerto Rico and the Puerto Rican statute was on the same level as the Longshoremen's and Harbor Workers' Act. In affirming *Flores,* 282 F. (2d) 153, the First Circuit did not consider the election theory as advanced by the district court.

The holding in this case does no violence to the rights of the defendant. If it should be hereafter determined that plaintiff was a "harbor worker" covered under the Longshoremen's and Harbor Workers' Compensation Act, the amounts thus far expended would be no more than what defendant was legally entitled to in any event. If the plaintiff is successful in establishing that he was a "member of a crew" and hence entitled to sue under the Jones Act, and if he subsequently obtains a verdict in his favor, there is no problem of double recovery as the amounts received under the Longshoremen's and Harbor Workers' Act may properly be deducted from the verdict awarded him under the Jones Act. *Gahagan Const. Corporation v. Armco,* 1 Cir., 165 F. (2d) 301, cert. den. 333 U. S. 876. If plaintiff was a "member of a crew," he would ordinarily be entitled to maintenance and cure at the expense of the defendant. Presumably cure to the point of maximum recovery has already been paid by defendant. With respect to compensation benefits at the rate of $54.00 per week, these payments may be considered along with such items of maintenance, if any, which may have been due to plaintiff as a "member of a crew" in outpatient status. Since

maintenance and cure would be due to a "seaman," irrespective of any showing of negligence, it is unlikely that the defendant can be seriously prejudiced by now permitting the Jones Act proceeding to go forward.

Without expressly holding that plaintiff was a "member of a crew," the defendant's motion to dismiss will be denied.

Present order on notice.

United States District Judge

Norfolk, Virginia
June 5, 1961

APPENDIX B

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 8914.

SYLVESTER LAWRENCE,

Appellee,

versus

NORFOLK DREDGING COMPANY, a Virginia corporation,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, AT NORFOLK.
WALTER E. HOFFMAN, DISTRICT JUDGE.

(Argued March 29, 1963. Decided July 16, 1963.)

Before BOREMAN and J. SPENCER BELL, Circuit Judges, and PREYER, District Judge.

Francis N. Crenshaw and Guilford D. Ware (Baird, Crenshaw & Ware on brief) for Appellant, and Wilfred R. Lorry (Sidney H. Kelsey, Abraham E. Freedman, Charles Sovel, and Freeman, Landy and Lorry on brief) for Appellee.

BOREMAN, Circuit Judge:

This case was instituted by Sylvester Lawrence, plaintiff, under the provisions of the Jones Act (46 U.S.C. § 688)[1] to recover damages for personal injuries sustained by him in an accident. The jury rendered its verdict in favor of the plaintiff in the amount of $100,000 and judgment thereon was entered after the motion of defendant, Norfolk Dredging Company, Inc., to set aside the verdict or to grant a new trial had been denied. On this appeal only two questions are presented: (1) Whether the trial judge erred in ruling, as a matter of law, that plaintiff was a member of a crew of a vessel; and (2) whether the verdict is excessive.

The uncontradicted and undisputed evidence disclosed that at the time of the accident the dredge "Talcott," owned by the defendant, was engaged in dredging operations in navigable waters in Oregon Inlet off Manteo, North Carolina. The dredge and its auxiliary vessels, including a derrick barge, an equipment barge, a tug and other vessels of the flotilla, had arrived in the area from Norfolk, Virginia, the day before the accident. The "Talcott" was equipped with sleeping accommodations for those aboard, the men ate their meals thereon and otherwise lived there when they were not working.

For ten or twelve years plaintiff had been employed by

---

[1] 46 U.S.C. § 688 in pertinent part is as follows:

"Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; * * *."

the defendant on various vessels. He started as a deck hand and was promoted to a deck foreman or "deck captain." He had been employed on the "Talcott" as a deck

captain for two or three years prior to the accident. On September 3, 1957, while working on one of the auxiliary vessels, a derrick barge, plaintiff was seriously injured when a 1500-pound anchor fell and landed across his legs.

Any question as to whether the "Talcott" was a *vessel* was removed from the case by the admission of defense counsel at the bar of the court. Therefore, the first primary inquiry is whether plaintiff was, at the time of the injury, a seaman and a member of the crew of the "Talcott' and so entitled to maintain his action under the Jones Act, or whether he was a harbor worker whose exclusive remedy was under the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. § 901 et seq.), hereinafter referred to as the Compensation Act.

Plaintiff's status as a maritime worker is clear and were it not for the Compensation Act, his right to a Jones Act remedy would not be open to question. The Compensation Act covers injuries "occurring upon the navigable waters of the United States" but excludes from its coverage a "member of a crew of any vessel" (33 U.S.C. § 903 (a) (1)). Thus the focal point of inquiry is whether the plaintiff falls within this excluded class.

During the period from September 3, 1957, the date of the accident, to April of 1959, when plaintiff was able to return to work, all of his medical expenses were caused to be paid by defendant, and the maximum compensation benefits provided by the Compensation Act were paid to him. After working nearly two years as a deck captain following his return to work in April 1959, plaintiff brought this action and defendant moved to dismiss on the ground that plaintiff was not a seaman and that he had elected to receive benefits under the Compensation Act to

the exclusion of the Jones Act. In an opinion reported in 194 F. Supp. 484, the District Court rejected this contention but expressly withheld any determination as to whether plaintiff was a seaman or harbor worker, reserving that for the jury. At the conclusion of the evidence and at the insistence of plaintiff's counsel, the trial court instructed the jury, as a matter of law, that the dredge was a vessel and plaintiff was a seaman member of its crew. It appears possible, however, from certain portions of the record that the court was not entirely free from doubt as to the correctness of its ruling which was based upon his conclusion that "there is just no material point of fact that is in dispute" and "it appears to me that these uncontroverted facts now resolve themselves into a question of law."

Was PLAINTIFF'S Status as a "MEMBER Of A Crew" A Question for Jury Determination?

On the first question the dredging company contends that although the facts which disclose the nature of plaintiff's duties at the time of the injury are undisputed, the ultimate determination as to whether Lawrence was a "member of the crew of a vessel" should have been left to the jury on the theory that the inferences which could properly be drawn from established facts are such that reasonable men could differ.

During the entire course of his employment by defendant, plaintiff was working mainly with the deck department on various vessels. His duties as "deck captain" consisted primarily of handling and maintaining in proper condition the earth conveying pipelines used by the dredge to move earth from the bottom of the harbor to the shore line which is the primary function of such a vessel. His duties also included tending the lines of the dredge and

its various auxiliary vessels and the posting of necessary lights. He slept and ate aboard the dredge, sometimes remaining aboard for four to six weeks at a time, although when he was not on watch or engaged in actual work, he was perfectly free to go and come as he pleased.

In urging that plaintiff's employment status could reasonably have been factually determined to have been that of an ordinary "laborer" rather than a member of the crew of the vessel, the defendant employer points to the following facts: Plaintiff was paid on an hourly basis; after working hours he could go and come as he pleased; he did not go to seamen's school and did not have seamen's papers; his primary duty was to handle and care for the conveying pipelines; the dredge to which he was attached had no motive power, no wheel, no rudder, no running lights, never ventured into the ocean and was operated without the maintenance of a log; in connection with his work he sometimes assisted in building up land areas for highways and other construction, assisted in maintaining levees, spillways and pontoon lines; and, when he ate and slept aboard the dredge, there was deducted from his wages the sum of one dollar a day for his food and for the use of towels and sheets.

The company relies most heavily upon the doctrine, announced by two important Supreme Court decisions, that the determination of the status of an employee as a member of a crew or otherwise turns on questions of fact and that even though the facts pertaining to the determination are undisputed, the interpretation of the facts is normally the province of the trier of the facts. *Senko* v. *La Crosse Dredging Corp.*, 352 U. S. 370 (1957); *South Chicago Coal & Dock Co.* v. *Bassett*, 309 U. S. 251 (1940). In the *Senko* decision the doctrine of *Bassett* was

explained to the effect that such determination is ordinarily for the finder of fact, meaning that "juries have the same discretion they have in finding negligence or any other fact." The Court further amplifies the doctrine by stating in *Senko*, 352 U. S. at 374, "The essence of this discretion is that a jury's decision is final if it has a reasonable basis, whether or not the appellate court agrees with the jury's estimate." With this general doctrine we are in full agreement; however, as this court has recently declared, "* * * [T]hat is not to say that there is a question of fact respecting the Jones Act remedy when the admitted facts leave no reasonable room for conflicting ultimate inferences." See *Hill* v. *Diamond*, 311 F. 2d 789, 793 (4th Cir. 1962).

We feel that our disposition of this question in the instant case is controlled by the Supreme Court decision in *Norton* v. *Warner Co.*, 321 U. S. 565 (1944), wherein the Court held that as a matter of law the injured employee was a member of the crew. The only apparent difference between *Norton* and this case before us is that in the former the injured employee received his compensation on a monthly rather than on an hourly basis and performed somewhat less varied duties. There, as here, the vessel was a barge, had no motive power, the employee bought his own meals, had little experience as a seaman and had only incidental navigational duties such as handling lines, responding to the whistles of tugs and posting navigational lights and signals, while his main duties consisted of taking general care of the vessel. Of course, the facts that the "Talcott" had not motive power, no wheel, no rudder, etc., are not strictly pertinent here since it is not disputed that the dredge was a "vessel."

The dredging company attempts to distinguish the *Nor-*

ton case from the instant case on the theory that the claimant in *Norton* was aboard exclusively for navigational purposes; but we are told by the Court in that decision that navigation, in the broad sense in which it is used in these cases, is not confined strictly to the actual navigating or movement of the vessel but "embraces duties essential for other purposes of the vessel," and that a person who at all times contributes to the labors about the operation and welfare of the vessel when she is upon a voyage is engaged in "navigation" and must be considered a member of the crew. It is significant to note that in *Norton* the Court was not sustaining a verdict of a fact finder but was affirming the Circuit Court's reversal of the action of the District Court in upholding a finding of fact; also that the decision in *Bassett*, supra, was expressly considered.

In *Daffin* v. *Pape*, 170 F. 2d 622 (5th Cir. 1948), the court held that the claimant was, as a matter of law, a member of the crew. The shipowner relied upon the *Bassett* case, the claimant upon *Norton*. Referring to the claimant, the court concluded, 170 F. 2d at 625:

> "Daffin was on board the yacht to aid in her navigation; his labors contributed to the accomplishment of the main objectives toward which the vessel was engaged. That he had not signed articles and did not eat and sleep aboard the vessel when it was in port, was of no consequence.
>
> "The duties Daffin was performing when he was injured were duties ordinarly performed by a member of the crew, and we think, as did the judge below, that he must be considered, in law, to have been a member of the Vigilant's crew."

See, also, *Tucker* v. *Branham*, 151 F. 2d 96 (3d Cir.

1945), where the facts were undisputed and the court held, as a matter of law, that the plaintiff was a member of the crew.

In the instant case plaintiff's duties were connected with and contributed to the operation and welfare of the dredge when it was engaged in its assigned function. To paraphrase the language of the Court in the *Norton* case, 321 U.S. at 573, we conclude that only by a distorted definition of the word "crew" as used in the Compensation Act could Lawrence be restricted to the remedy which that Act affords and be excluded from recovery under the Jones Act or be denied relief in admiralty.

We conclude that the District Court did not err in holding, as a matter of law, that plaintiff was a member of the crew.

WAS THE VERDICT EXCESSIVE?

We find no merit in the defendant's second contention that the verdict was excessive. The evidence reveals that although the initial injury consisted principally of a fracture of the femur, complications from the fracture and its treatment produced serious, painful and permanently disabling conditions. The treatment required open reduction involving two surgical procedures during which an intermedullary rod was inserted into the fractured portions of the bone and subsequently removed. The testimony reveals that these procedures caused a great deal of pain and suffering. Complicating the injury and its treatment, plaintiff developed a pulmonary infarct resulting from a thrombophlebitis in the affected leg. The pulmonary infarct resulted in permanent and somewhat disabling scar-

ring of the lung tissue; and the thrombophlebitis has left him with a postphlebitic leg, a permanent, painful condition which the medical evidence reveals will grow progressively worse, and which is adversely affected by the performance of manual labor, the only type of work for which the evidence shows Lawrence to be equipped, he having had only a sixth grade education and no working experience in any other field of endeavor. Furthermore, he was hospitalized for eight months and continued thereafter under a doctor's care for a period of almost four years.

The fact that Lawrence has earned as much or more since his return to work at the same job following the accident as he had earned prior to the accident is strenuously urged as a circumstance to support the contention that the verdict was excessive. However, a comparison of earnings before and after the injuries is not a particularly significant or controlling consideration where there was evidence before the jury to support the conclusion that, under circumstances such as these, the injuries will adversely affect plaintiff's future employment possibilities. See *Wiles* v. *New York, Chicago & St. Louis Railroad Co.*, 283 F. 2d 328 (3d Cir. 1960), *cert. denied*, 364 U. S. 900; *Vaudree* v. *Iron City Sand & Gravel Co.*, 201 F. Supp. 447 (W.D. Pa. 1962), *aff'd*, 315 F. 2d 647 (3d Cir. 1963). We agree with the plaintiff's assertion that the evidence respecting his injuries could have justified a verdict even larger in amount than the one rendered.

Affirmed.

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IN THE

Supreme Court of the United States

October Term, 1963.

No. 528.

NORFOLK DREDGING COMPANY a Virginia corporation,
Petitioner,

v.

SYLVESTER LAWRENCE,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION.

ABRAHAM E. FREEDMAN,
WILFRED R. LORRY,
CHARLES SOVEL,
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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1963.

No. 528.

NORFOLK DREDGING COMPANY, A VIRGINIA CORPORATION,

Petitioner,

v.

SYLVESTER LAWRENCE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

OPINIONS BELOW.

The memorandum opinion of the District Court denying defendant's motion to dismiss is reported at 194 F. Supp. 484 (E. D. Va. 1961). The opinion of the Court of Appeals for the Fourth Circuit unanimously affirming the judgment of the District Court on the jury verdict in favor of Lawrence is reported at 319 F. 2d 805 (1963).

JURISDICTION.

The jurisdictional requisites are adequately set forth in the petition.

QUESTION PRESENTED.

Where uncontradicted evidence established that a dredge was in navigation, that the plaintiff had been a deck captain on that dredge for over a year, living, eating and sleeping aboard her, that he performed navigational duties and was not employed in the loading, unloading, refitting or repairing of ships, is not the plaintiff a seaman as a matter of law and entitled to sue under the Jones Act, 46 U. S. C. A. § 688?

STATUTES INVOLVED.

The statutes involved are the Jones Act, 46 U. S. C. A. § 688, and the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. A. § 901 et seq.

STATEMENT OF THE CASE.

Respondent, Sylvester Lawrence, suffered serious personal injuries on September 3, 1957 while in the course of his employment as a member of the crew of a dredge. For several years prior to the accident, Lawrence had served as a deck captain aboard the Dredge "Talcott", a vessel owned and operated by petitioner, Norfolk Dredging Company (Resp. App. 6).* At the time of the accident, the "Talcott" and her auxiliary vessels were in navigable waters in Oregon Inlet off Manteo, North Carolina. While working aboard one of these auxiliary vessels, derrick barge #8, respondent was seriously injured when a 1500-pound anchor fell and landed across his legs (Resp. App. 7-8).

The uncontradicted and undisputed evidence disclosed that at the time of the accident, the "Talcott" was engaged in dredging operations in Oregon Inlet off Manteo, North Carolina. The dredge and its auxiliary vessels, including a derrick barge, an equipment barge, a tug, and other vessels of the flotilla, had arrived in the area the previous day, having sailed down from Norfolk, Virginia (Resp. App. 11-12). The dredge was the largest vessel of the flotilla. It had sleeping accommodations for the crew and the men also ate their meals on the dredge and otherwise lived there when they were not working.

The dredge had no motive power of its own but was towed from place to place by tugs. While underway she was required to and did post navigational lights and in other respects complied with the rules of the road relating to vessels in navigation (Resp. App. 88). In addition, petitioner had permanently enrolled the "Talcott" as a vessel of the United States at the Port of Norfolk, Virginia (Resp. App. 83-87, 119).

* Resp. App. refers to the appendix to brief for appellee, Sylvester Lawrence, filed with the United States Court of Appeals for the Fourth Circuit and made a part of the record before this Honorable Court.

Prior to the accident, respondent had been employed by petitioner for ten or twelve years on various vessels. He started as a deck hand and had been promoted to a deck foreman, or deck captain. He had been aboard the "Talcott" as deck captain for two or three years prior to the accident (Resp. App. 28-29). His various duties included tending the lines of the dredge and the various auxiliary vessels, and the posting of navigational lights (Resp. App. 30-32). He slept and ate aboard the dredge, frequently staying aboard for four to six weeks at a time before going home for a weekend (Resp. App. 33). The dredge did not carry cargo and there was no evidence that respondent had any duties relating to the loading or unloading of cargo, or the repairing or refitting of vessels. The undisputed and uncontradicted evidence was that his duties were strictly those that were traditionally performed by seamen [1]—duties in furtherance of the vessel's enterprise.

1. Captain Stanley E. Livingston, a master mariner of over 40 years experience, testified without contradiction that plaintiff's duties were those which traditionally and historically were performed by seamen (Resp. App. 66-69).

REASONS WHY THE PETITION SHOULD BE DENIED.

In declaring that respondent was a seaman as a matter of law, the trial court in no way usurped the jury's function, but rather properly performed its traditional function of determining the law applicable in the case before it. A review of the record in this case clearly establishes that there is absolutely no basis whatsoever for a finding that respondent fell within the coverage of the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. A. Sec. 901, et seq. The facts bearing on this point are uncontradicted. While the petition is couched in terms of the right to a jury trial, petitioner actually is proposing that this Court allocate to the jury the *legislative* function of determining what class of workers shall receive compensation and what workers shall be permitted to sue for damages. This is not and never has been the role of the jury under our legal system and is completely contrary to the constitutional division of power between the legislative and judicial branches of the federal government.

It is for Congress, in the exercise of its legislative power, to determine whether a given class of workers shall receive compensation or instead shall be permitted to sue for damages. It is the duty of the courts to interpret this legislative intent in applying the law to individual cases. Where the facts are clear, the court must declare the applicable law on the basis of the evidence which it has heard. It is only when the facts are not clear, or give rise to conflicting inferences, that the jury has a role, and then its *only* duty is to resolve these issues of fact. In the instant case, as we shall demonstrate, the evidence clearly established respondent's status as a seaman; accordingly, there was nothing to submit to the jury on this issue, and the court correctly decided this as a matter of law.

At the time he was injured, respondent was serving *as a member of the crew* of the Dredge "Talcott". The accident occurred on navigable waters (Resp. App. 7-8).

Accordingly, respondent's status as a maritime worker is clear and were it not for the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. A. Sec. 901 et seq., his right to a Jones Act remedy would not be subject to question. See *International Stevedoring Co. v. Haverty*, 272 U. S. 50, 71 L. Ed. 157 (1926). The Longshoremen's Compensation Act covers injuries "occurring upon the navigable waters of the United States", which would include the instant accident, but excludes from its coverage "members of a crew of a vessel", 33 U. S. C. A. Sec. 903(1), who, instead retain their Jones Act remedy, see *Senko v. LaCrosse Dredging Corp.*, 352 U. S. 370, 1 L. Ed. 2d 404 (1957). Thus, the focal point of inquiry is whether respondent falls within this latter class.

In attempting to reconcile the traditional policy of the maritime law of providing broad protection to maritime workers with the congressional desire, manifested by the longshoremen's compensation act, to provide a different kind of protection to shore based harbor workers, the courts have been confronted with a myriad of factual situations in which the nature of the work performed does not fit precisely within the popular conception of a seaman or a harbor worker. While status as a seaman or harbor worker frequently is referred to as a factual issue, it is clear that the problem actually is one of mixed fact and law, for upon its determination rests the court's right to exercise jurisdiction. A court or jury cannot confer jurisdiction upon itself by determining that an individual is a member of the crew when, under the applicable legal standards he is not; nor is an injured seaman to be denied his civil remedy by a legally unsupportable "factual" determination that he is a harbor worker. Here the plaintiff's rights arise under specific congressional legislation. It is not within the province of the jury to alter the scope of this legislation. The problem is one of statutory interpretation and is primarily a question of law after the relevant facts have been determined.

Because of the varied nature of maritime employment, the status of an individual as either a seaman or longshoreman cannot always be easily resolved. The facts may not be clear, or may give rise to inferences so conflicting that reasonable men may well differ as to whether or not a particular worker is or is not a "member of the crew of a vessel". In such cases, the decision is left to the trier of fact, subject, however, to judicial review to the same extent as any other factual determination. *Senko v. LaCrosse Dredging Co., supra.* When, however, an individual's status as either a harbor worker or crew member is clear, it is the court's right and duty to declare this as a matter of law, just as it is the court's duty to determine the applicable law in any other situation presented to it. This Court has recognized its role, and the role of the lower courts, in this regard and has not hesitated to determine status as a matter of law where the evidence presented a sufficient basis for decision. The leading case is *Norton v. Warner Co.*, 321 U. S. 565, 88 L. Ed. 931 (1944), in which the Court set aside a finding by a compensation commissioner that the claimant was a harbor worker rather than a Jones Act seaman. The Court carefully noted its responsibility for delineating the scope of the two acts:

> "If the award were to stand, there would be brought within the (longshoremen's) Act a group of workers whom we do not believe Congress intended to include. The Senate Report makes it clear that 'the purpose of this bill is to provide for compensation, in the stead of liability, for a class of employees commonly known as "longshoremen". *These men are mainly employed in loading, unloading, refitting and repairing ships.*' . . . . These are basic rights (referring to the right of seamen to maintenance and cure and a civil action under the maritime law). The maritime unions appearing in the present case maintain that those remedies are indeed superior to the relief

afforded by the Longshoremen's and Harbor Workers' Compensation Act. Whether they are more desirable than a system of compensation is not for us to determine. But where Congress has provided that those basic rights shall not be withheld from a class or classes of maritime employees, *it is our duty on judicial review to respect the command and not permit the exemption to be narrowed whether by administrative construction or otherwise.*" 321 U. S. at 569-571, 88 L. Ed. at 936-937. (Emphasis supplied.)

More recently the Court of Appeals for the Fourth Circuit in *Hill v. Diamond Construction Company*, 311 F. 2d 789 (4th Cir., 1962), reaffirmed the doctrine that status as a seaman may be determined as a matter of law as follows (at p. 793):

> "If a claimant is injured while working aboard a vessel in navigation, any question of his right to resort to the remedy of the Jones Act will frequently turn upon inferences of fact, *but that is not to say that there is a question of fact respecting the Jones Act remedy when the admitted facts leaves no reasonable room for conflicting ultimate inferences.* If a seaman under Articles is injured while performing his duties aboard a fully manned ship in service, there is no preliminary question of fact as to his right to resort to the Jones Act simply because the ship might wish him relegated to some other remedy. Nor is there any such preliminary question of fact if a construction worker on a dock is injured simply because he would like to associate himself with the transient vessel which was temporarily moored there. Similarly, when there is a basis for reasonable difference as to the status of the structure of a vessel in navigation, the ultimate inference may be one of fact, but when there is no such basis, there is no preliminary factual question as

to the applicability of the Jones Act. . . . *There are thus numerous cases in which the court has disposed of the matter upon motion,* for there was no debatable factual question to be resolved.

"The plaintiffs' claim essentially is that because in some cases the questions of the status of the claimant and of the structure in whose service he contends he was engaged have been held to be ones of fact, the assertion of the claim, however, baseless, created a question of fact in every case. A similar contention was made to the Court of Appeals for the Fifth Circuit in Thibodeaux v. J. Ray McDermott & Co. and similarly rejected. *Of course, there is no such doctrine.*" (Emphasis supplied.)

The uncontradicted evidence established that respondent had numerous duties relating to the navigation of the dredge. These duties included tending the lines of the dredge and its auxiliary vessels (Resp. App. 30), seeing that the lights were placed on the various vessels in accordance with the Coast Guard regulations (Resp. App. 31), and checking towing lines (Resp. App. 34). In addition, he had a wide variety of duties directly related to the vessel's dredging activities and was in charge of the floating pipe line which carried off the material sucked up by the dredge. Virtually all this work was performed on the water.

The foregoing list of duties establishes without doubt that respondent's work was not the kind of work which Congress intended to embrace within the coverage of the Longshoremen's and Harbor Workers' Compensation Act. As this Court stated in *Norton v. Warner, supra,* 321 U. S. at 572, 88 L. Ed. at 937:

"We said in the Bassett case that the term 'crew' embraced those 'who are naturally and primarily on

board', the vessel 'to aid in her navigation'. (Citation omitted.) But navigation is not limited to 'putting over the helm'. It also embraces duties essential for other purposes of the vessel. Certainly members of the crew are not confined to those who can 'hand, reef and steer'. Judge Hough pointed out in The Buena Ventura, (D. C.) 243 F. 797, 799, that 'everyone is entitled to the privilege of a seaman, who, like seamen, at all times contribute to and labor about the operation and welfare of the ship when she is upon a voyage.' And see The Minna, (D. C.) 11 F. 759; Disbrow v. The Walsh Brothers, (D. C.) 36 F. 607, 68 (bargemen). We think that 'crew' must have at least as broad a meaning under the Act. For it is plain the amendment exempting a 'master or member of a crew' that ship's company was not brought under the Act. And we are told by the Senate Report as already noted, that the purpose of the legislation was to provide compensation for those who '*are mainly employed in loading, unloading, refitting, and repairing ships.*' S. Rep. No. 973, supra." (Emphasis supplied.)

The italicized portion of the foregoing quote is extremely significant for it is the basis of the decision in *Norton v. Warner*, *supra*, and the cases which followed in the wake of this definitive opinion. The longshoremen's act was intended to cover those men engaged in the loading or unloading of cargo or the repairing or refitting of ships. The claimant in *Norton v. Warner*, *supra*, was not within the coverage of the act because his duties were not the kind that the act was designated to cover. In the instant case, Lawrence, like the claimant in *Norton v. Warner*, *supra*, was not "mainly employed in loading, unloading, refitting or repairing ships." He therefore was not within the coverage of the Congressional legislation, and neither petitioner, nor the court, nor the jury were free to put him there.

Petitioner did not offer any evidence that Lawrence was primarily engaged in the "loading, unloading, refitting or repairing of ships." Instead, petitioner emphasizes that his primary job was to handle pipe lines, that his work sometimes involved the building up of land areas and that he was essentially a laborer. However, none of these factors would justify denying plaintiff his remedy under the Jones Act. On the contrary, they merely serve to emphasize that he was performing the basic duties of a member of the crew of a dredge, a vessel in navigation—duties which are not within the coverage of the Longshoremen's Act because they are not primarily related to the "loading, unloading, refitting, and repairing of ships," and consequently still fall within the scope of the Jones Act. *Norton v. Warner, supra.* A dredge, though stationary while operating to maintain a channel's depth to permit the uninterrupted passage of ships, is facilitating the movement of vessels in commerce and so engaged in navigation in the accomplishment of her work. This aid to navigation has the same legal significance in relation to the Jones Act, as transportation on navigable waters. Consequently, members of the crew of the dredge engaged in furtherance of the vessel's enterprise are seamen beyond the ambit of the Longshoremen's and Harbor Workers' Compensation Act. See *Ellis v. United States*, 206 U. S. 246, 260, 51 L. Ed. 1047, 1054 (1907).

The trial judge's determination that the Jones Act was applicable as a matter of law is supported by ample authority. In *Pariser v. City of New York*, 146 F. 2d 431, 433 (2d Cir., 1945), the Court, speaking through Judge Augustus N. Hand, stated:

> "The defendant further argues that the court lacked jurisdiction of the case because the plaintiff was not a seaman. This contention is wholly without merit. It is well settled that such an employee working on a dredge is a seaman entitled to sue under the Jones Act,

46 U. S. C. A. § 688. Norton v. Warner, 321 U. S. 656, 64 S. Ct. 747; Ellis v. United States, 206 U. S. 246, 259, 27 S. Ct. 600, 51 L. Ed. 1047, 11 Ann. Cas. 589."

Simiarly, in the leading case of *Kibadeaux v. Standard Dredging Co.*, 81 F. 2d 670, 673, 674 (5th Cir.), *cert. den.* 299 U. S. 549, 81 L. Ed. 404 (1936), the court, in a factual situation identical with that presented in the instant case, held that the Jones Act was applicable as a matter of law. The Court stated:

> "We think this deckhand, permanently employed on the vessel and quartered there, under duty to aid in navigating her at sea while going from harbor to harbor, or in maneuvering her while at work in a harbor to prevent maritime collisions as well as to accomplish her work, which itself is to facilitate the entry and exit of vessels of commerce, is a seaman. . . . This dredge was a vessel and Kibadeaux a seaman and a member of her crew. An injury to him by the unseaworthiness of the vessel was cognizable in admiralty. Neither the longshoremen's Act nor the state statutes apply."

In *Summerlin v. Massman Construction Co.*, 199 F. 2d 715 (4th Cir., 1952), the Court of Appeals for the Fourth Circuit held, *as a matter of law*, that an employee whose navigational duties were less apparent than that of the respondent was a seaman entitled to sue under the Jones Act. The court stated at page 716:

> "The case cannot be distinguished on this point from that considered by us in Jeffrey v. Henderson Brothers, 4th Cir., 193 F. 2d 589, where employees on a coal cleaning barge which had been libelled by material men, filed wage claims that were held to be prior to the claim of a mortgagee. The barge was furnished with

machinery and equipment for cleaning and screening coal. It was without motive power of its own but had been moved close to the shore on the Monongahela River in West Virginia and kept in place by mooring lines and spuds. The machinery was used to lift coal from refuse piles along the river bank to the barge where it was cleaned and transferred to barges for transportation and sold. The wage claimants were primarily engaged in the coal cleaning operation. Their maritime activities were reduced to a minimum, consisting for the most part in assisting in moving the barge along the shore when necessary and transferring the cleaned coal to other vessels. We held, after reviewing the pertinent authorities, that the employees were seamen employed on a vessel engaged in maritime operations and were therefore entitled to a maritime lien for wages. *The similarity between these facts and those in the pending case needs no comment, and we conclude that the plaintiff's claim falls within the scope of the Jones Act.*" (Emphasis supplied.)

Petitioner's reliance on cases such as *Senko v. LaCrosse Dredging Corp., supra; South Chicago Coal & Dock Company et al. v. Bassett*, 309 U. S. 251, 84 L. Ed. 732 (1940); *Grimes v. Raymond Concrete Tile Co.*, 356 U. S. 252, 2 L. Ed. 2d 737 (1958); and *Butler v. Whiteman*, 356 U. S. 271, 2 L. Ed. 2d 754 (1958), is misplaced. These cases do not hold, as petitioner contends, that it is for the jury to determine whether an injured worker receives compensation or may sue for damages. Rather, they stand for the proposition that if there is any evidence, no matter how slight, that an injured worker may be within the coverage of the Jones Act, then the case must go to the jury. This is because a finding that a man is covered by the Longshoremen's and Harbor Workers' Compensation Act in effect operates to deprive him of his right to trial by jury. So basic and

fundamental is the right to a jury trial *on the merits* of a claim that this Court, in interpreting the provisions of the Longshoremen's and Harbor Workers' Compensation Act has carefully limited its scope to those factual situations which were clearly before Congress at the time of the enactment of the compensation law. Thus, in the case of *Reed v. Yaka*, — U. S. —, 10 L. Ed. 2d 448 (1963), this Court specifically refused to extend the coverage of the compensation act to a factual situation which it was not clear that Congress intended that it should cover. It is for the same reason that this Court in *Norton v. Warner*, *supra*, referred to the legislative history of the Compensation Act and specifically pointed out that it was intended only to cover those men engaged in the loading, unloading, repairing or refitting of ships. To extend the coverage of the Act beyond this limited area would operate to deprive the right to a jury trial to classes of workers whom Congress did not intend to so limit. The right to a jury trial, grounded as it is in the Seventh Amendment to the Constitution, see *Atlantic & Gulf Stevedores v. Ellerman Lines*, 369 U. S. 355, 359 (1962) is too important to be denied on the basis of supposition or implication. Despite the citation of authorities upholding the right to a jury trial, petitioner is not seeking to preserve the jury trial, but rather is attempting to deprive the instant respondent of his right to a jury trial on the merits of his claim. And in so doing, petitioner is attempting to extend the coverage of the Longshoremen's and Harbor Workers' Compensation Act to a class of workers whom Congress never intended to cover. Petitioner was given every opportunity, both in the trial court and in the Court of Appeals, to demonstrate that respondent was somehow within the coverage of the Compensation Act, but was unable to convince any of the able jurists below that there was even the slightest evidence to support this contention.

CONCLUSION.

The instant petition does not raise any questions that warrant consideration by this Court. Petitioner has been unable to demonstrate any conflict between the instant decision and the views of any other Circuit Court of Appeals, nor, for that matter, has petitioner been able to cite a single case where a dredge worker was held to fall within the coverage of the Longshoremen's and Harbor Workers' Compensation Act. Accordingly, for all the above reasons, it is respectfully submitted that the Petition for Certiorari should be denied.

Respectfully submitted,

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